
In The
SUPREME COURT of the UNITED STATES

October Term, 1970



JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE,
Sheriff of Dane County,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals on re-hearing *en banc* is reported at 436 F. 2d 331 (1971), and printed in the Appendix, pp. 70a-79a. The opinion of the United States Court of Appeals is reported at 436 F. 2d 326 (1970), and printed in the Appendix, pp. 80a-88a. The opinion of the United States District Court, Western District of Wisconsin is printed at 311 F. Supp. 772 (1970), and printed in the Appendix, pp. 91a-108a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit after re-hearing *en banc* was entered on January 6, 1971. The Petition for a Writ of Certiorari was filed on April 6, 1971, and granted on June 7, 1971. — U. S. —, — S. Ct. —, 29 L. Ed. 2d 679 (1971). The jurisdiction of this Court rests on 28 U. S. C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Sec. 8, Wisconsin Constitution
Rules; contempts; expulsion

Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with concurrence of two-thirds of all members elected, expel a member, but no member shall be expelled a second time for the same cause. (Wis. Stats. 1967, p. 35).

STATUTES INVOLVED

Sec. 13.26 Wisconsin Statutes

Contempt

(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

* * *

(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.

* * *

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature. (Chp. 13, Wis. Stats., 1967, p. 202).

Sec. 13.27 Wisconsin Statutes

Punishment for Contempt

(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane County jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane County, and may be fined not more than \$200 or imprisoned not more than one year in the county jail. (Wis. Stats. 1967, p. 202).

QUESTIONS PRESENTED

1. Whether a legislative body can, consistent with due process of law, two days after alleged contemptuous conduct, *ex parte* imprison a person under its contempt power without giving the person any notice of the charge against him or any opportunity whatsoever to appear before the legislative body and respond to the charge.

2. Whether consistent with due process of law a person can be found in contempt of a legislative body when the legislative contempt resolution sets forth mere conclusions and fails to set forth any underlying facts or circumstances which constituted the alleged contemptuous behavior.

STATEMENT OF THE CASE.

On October 1, 1969, the Assembly, one of two houses of the State of Wisconsin Legislature, passed the following resolution:

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane County Jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 Regular Session of the Wisconsin Legislature in violation of Assembly Rule 10, prevented the Assembly from conducting public business and performing its constitutional duty; now therefore be it

Resolved by the Assembly, That the Assembly finds that the above cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the House and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26(1)(b) of the Wisconsin Statutes, and Article 4, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Section 13.26 and 13.27 of the Wisconsin Statutes orders the imprisonment of James E. Groppi for a period of six months or for the duration of the 1969 Regular Session, whichever is briefer in the Dane County Jail and directs the Sheriff of Dane County to seize said person and deliver him to the jailer of the Dane County Jail; and be it further

Resolved, That the Assembly directs a copy of this resolution to be transmitted to Dane County District

Attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and be it further

Resolved, That the Attorney General is respectfully requested to represent the Assembly in any litigation arising therefrom.

Subsequently a copy of the Resolution was served on Groppi and he was imprisoned in the Dane County Jail. Groppi was never served with a copy of the Resolution prior to his imprisonment and was afforded no specification of the charge against him, no notice and no hearing. The Circuit Court for Dane County dismissed Groppi's application for a Writ of Habeas Corpus as did the Wisconsin Supreme Court. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N. W. 2d 192 (1969).

After the Dane County Circuit Court denied Groppi's petition, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Western District of Wisconsin pursuant to Sec. 1254, T. 28, U. S. C. Groppi was admitted to bail by the District Court after the Wisconsin Supreme Court denied his petition. At that time he had served ten days of the sentence imposed by the Assembly under the Resolution.

On April 8, 1970, the District Court held the Assembly could not summarily impose a jail sentence for legislative contempt without first providing Groppi with some "minimal opportunity" to appear and to respond to the charge. Accordingly, the Court granted the Writ of Habeas Corpus and ordered that Groppi be released from any further custody or restraint pursuant to the Resolution. *Groppi v. Leslie*, 311 F. Supp. 772 (W. D. Wis. 1970).

On October 28, 1970, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and directed that an order be entered denying Groppi's petition for habeas corpus and granting the Respondent Sheriff's motion to dismiss. *Groppi v. Leslie*, 436 F. 2d 326 (1970). Subsequently, the Court of Appeals granted Groppi's petition for a rehearing *en banc* and in a four to three decision affirmed the Court's decision of October 28, 1970. *Groppi v. Leslie*, 436 F. 2d 331 (1971).

Prior to the passage of the contempt resolution by the Wisconsin Assembly, the Attorney General for the State of Wisconsin had obtained a temporary restraining order in the Circuit Court for Dane County enjoining Groppi from entering the Capitol Building which housed the Assembly. Subsequently, on October 17, 1969, the Circuit Court for Dane County vacated the temporary restraining order and denied the Attorney General permanent relief finding that there was no evidence that there would be any further disturbances of the Wisconsin Assembly by Groppi.

In addition to the penalties imposed in the contempt resolution, Groppi was charged with disorderly conduct by the District Attorney for Dane County, Wisconsin for his role in the incident mentioned in the contempt resolution. A jury trial was held in the County Court for Dane County, Wisconsin, on that charge and the petitioner was discharged by the Court after the jury was unable to reach a verdict.

SUMMARY OF ARGUMENT

The decision of the Court below has for the first time in the history of jurisprudence held that a legislative body can imprison an individual for six months without giving him any notice of the charge against him or any opportunity to respond thereto. Even a Court exercising its summary contempt power could not imprison an individual in the way the Wisconsin Assembly imprisoned petitioner herein. *United States v. Galante*, 278 F. 2d 72, 78 (C. A. 2, 1962) (Judge Friendly dissenting). The political and physical differences between a court and a legislative body are strong reasons to not extend the summary contempt power of the judiciary to legislative bodies. The two day delay between the alleged contemptuous incident and the finding of contempt by the legislature was such as to deny the legislature the right to imprison petitioner without notice or any hearing. *Mayberry v. Pennsylvania*, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971); *Johnson v. Mississippi*, — U. S. —, 91 S. Ct. —, 29 L. Ed. 2d 423 (1971). The conclusionary nature of the contempt resolution makes it constitutionally deficient since it fails to state the underlying facts and makes it impossible to obtain any meaningful review of the contempt finding. *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1924); *Ex Parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

I. THE WISCONSIN LEGISLATURE DID NOT HAVE THE POWER TO SUMMARILY PUNISH FOR CONTEMPT.

The contempt powers of courts and legislatures have a common source in the divine right of the monarchy which exercised absolute and unchallenged authority. The legislative power of contempt emerged at a time when the House of Commons performed judicial as well as legislative functions. See Goldfarb, *The Contempt Power*, 25-36 (1963).¹ In addition, the exercise of contempt power has been justified as inherent within a legislative body because the power is necessary to protect its authority. While these historical factors establish the existence of a contempt power on the part of the legislative body, they do not answer the question of the proper procedural requirements so that the legislative contempt power is exercised in accord with due process. The summary powers of courts have been limited to those situations where the misconduct was actually observed by the Court and where immediate punishment was necessary to restore order and maintain the dignity and authority of the court. *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767; *Harris v. United States*, 382 U. S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240. Because of the dangers inherent in the summary contempt power, this Court has construed the power as an exception to the normal requirements of due process and have refused to extend it. *Johnson v. Mississippi*, — U. S. —, 91 S. Ct. —, 29 L. Ed.

¹The author, however, challenges the need for either judicial or legislative contempt powers since Latin American and European governmental systems exist, and survive, without such power. He also questions the consistency of contempt power with our present philosophical concept that sovereignty resides in the people. Further, he questions whether legislative contempt power is justified today when legislatures no longer exercise judicial powers.

2d 423 (1971); *Mayberry v. Pennsylvania*, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971); *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948). The summary contempt power has been described as "perhaps nearest akin to despotic power of any power existing under our form of Government." *State ex rel. Attorney General v. Circuit Court*, 97 Wis. 1, 8 (1897). Good reasons exist for not extending that power to legislatures.

First, courts differ significantly from legislatures. It is the business of judges to decide particular cases. As Judge Stevens stated in his dissenting opinion on the rehearing *en banc* in this matter,

Without reflecting adversely on the importance and dignity of the legislative function, it must be recognized that legislators are more responsive to the temporary moods of the body politic than are judges. *Groppi v. Leslie*, 436 F. 2d 331 at p. 335, App. p. 75a-76a.

In *Johnson v. Mississippi*, *supra*, it was held that a judge "was so enmeshed in matters involving" a defendant "as to make it most appropriate for another judge to sit. Trial before an 'unbiased judge' is essential to due process." — U. S. —, 91 S. Ct. —, 29 L. Ed. 2d 423, 427. In the instant case, the Assembly certainly cannot be viewed as an "unbiased judge". The demonstrators who entered the Assembly chamber did so to protest the legislative action of the Assembly with regard to welfare cut-backs. The responsiveness of legislators to external pressures, coupled with the fact of a direct attack upon their actions, clearly so enmeshed the members of the Assembly as to make detached and unbiased judgment impossible.

Second, the physical contours of most legislative cham-

bers, along with the nature of legislative sessions, and the absence of transcribed records of legislative proceedings, make it reasonable to believe that the room for error in perception and evaluation of the alleged contumacious conduct is far greater before a legislative body than before a Court in the restricted area in which a Court may make a summary contempt finding, and review of any action taken is much more difficult. In the instant case, as Judge Doyle of the District Court pointed out, a question arises whether "all of the essential elements of the misconduct occurred under the eye of the members of the assembly." (App. p. 99a). There is no indication in the resolution as to how many members of the Assembly that voted for the Resolution were in fact present two days earlier and observed the alleged contemptuous conduct. If the conduct was not observed by those voting, the parallel to a court's summary powers is destroyed. The absence of any record as to who viewed the conduct makes the review of a conviction for summary legislative contempt unavailable or of such limited scope as to be futile. And yet, without judicial review there can be no check on the caprice or arbitrariness of the legislative body. If review is limited to a determination of the technical adequacy of the contempt resolution, such review is essentially worthless. If the reviewing court is to go beyond the resolution and look to the underlying facts, it is impossible to see how the court can make any factual determination. *Groppi v. Leslie*, 311 F. Supp. 772 (W. D. Wis. 1970, (App. p. 91a.))

As an example of this problem, the facts given by the Wisconsin Supreme Court in its denial of petitioner's request for habeas corpus relief was based on a review of the

facts as described by the news media.² The Wisconsin Supreme Court denied petitioner's motion for rehearing—a rehearing requested in order to clarify the procedure for judicial review of the legislative action. The denial of the petition for rehearing was made without any opinion by the Wisconsin Supreme Court. (App. p. 65a.)

Third, most foreign legislative bodies function without this power and American legislatures have functioned to date without this summary power. See Goldfarb, *The Contempt Power*, 25-36 (1963). Nothing prevents the removal from the legislature of persons obstructing the legislative activity. *Illinois v. Allen*, 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *Mayberry v. Pennsylvania*, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971), (concurring opinion, Mr. Chief Justice Burger). Many other laws, including disorderly conduct and unlawful assembly, were and are available if the legislature determines that following due process is too burdensome. In the instant case, petitioner in addition to being cited for contempt was also charged with disorderly conduct in the County Court for Dane County, Wisconsin.³ The fact that our legislatures, national and State, have survived and prospered to date without the power to imprison for contempt without notice and hearing is reason enough not to extend such a grave and dangerous power to them. The reasoning that in this age of "the politics of confrontation" such a power is necessary

²The Wisconsin court held the action of the legislature was reviewable, *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N. W. 2d 192, 197 (1969), a surprising holding in light of earlier decisions. See Judge Doyle's opinion, *Groppi v. Leslie*, 311 F. Supp. 772, 779, n. 9, (W. D. Wis. 1970).

³A jury trial was held in the County Court for Dane County, Wisconsin, on the charge that petitioner was in violation of the disorderly conduct statute of the State of Wisconsin. At the trial the petitioner was discharged after the jury was unable to reach a verdict.

to preserve the orderly processes of government exhibits a failure to recognize that our Constitutional form of Government was intended to survive and has, in fact, survived perilous and tense times. The framers of the Constitution drafted it to guarantee that no man, despite the political climate of the country, would be subjected to imprisonment without an opportunity to know and respond to the charges against him. Father Groppi does not ask that this Court be "unmindful of recent relatively unprecedented illegal disruptions of the proceedings in courts in our country". (Judge Pell, App. p. 83a). But, Father Groppi does ask that he be accorded the same procedural rights that others who have allegedly been involved in such disruptions have been granted, by courts, namely, notice and an opportunity to respond. Being mindful of these disruptions does not mean or require a neglect of those rights promised each citizen by the Constitution.

II. ASSUMING SUMMARY CONTEMPT POWER RESIDES IN LEGISLATIVE BODIES, THE INSTANT CASE IS NOT, FACTUALLY, AN APPROPRIATE ONE FOR THE EXERCISE OF THIS POWER.

In *Anderson v. Dunn*, 19 U. S. (6 Wheat.) 204, 5 L. Ed. 242 (1821), the foundation for recognition of legislative contempt power in the United States, the contempt authority was limited to "the least possible power adequate to the end proposed". 19 U. S. (6 Wheat.) 204, 5 L. Ed. 242. This maxim has often been cited and repeated in dealing with legislative contempts. See Wright, *Federal Practice and Procedure*, Rule 42, Section 702, pp. 146-154. The important question in light of this limitation becomes what end the Wisconsin As-

sembly was seeking in citing Father Groppi for contempt. The Assembly Resolution is couched in terms that indicate plainly the body was seeking to punish a past offense. Father Groppi, according to the Resolution, was to be punished for having invaded the Assembly's Chambers two days earlier. The fact that the Assembly sought to punish past conduct, as opposed to present or threatened conduct, destroys any justifiable reason for the use of summary proceedings, for the desired end could have been obtained by use of Wisconsin's criminal laws and procedure.

At the time of the Resolution's passage, the alleged obstruction or disruption of the Assembly had ceased. The throng had left the legislative chamber, and there is no indication anywhere in the record that a recurrence of any disruptive conduct was imminent or even threatened. The Attorney General had obtained a temporary restraining order to forestall a recurrence. In light of these facts, the actions of the Assembly, in summarily dealing with Father Groppi, evidence an inappropriate exercise of summary power even if such a power is found to reside in the Assembly.

The Wisconsin Supreme Court, in denying Father Groppi habeas corpus relief, distinguished between judicial and legislative contempt. Contrasting the legislative power of contempt with that of the courts, the Supreme Court said:

Under the judicial contempt power, a contemnor is imprisoned, not to prevent him from continuing to interfere with the judicial function of the court in the future but to punish him for having completed a contemptuous act in the presence of the court. This is punishment necessary to maintain the dignity, decorum, and respect

for the Court. This objective admittedly is also found in punishment for some crimes. *In contrast, the legislative power of contempt, restricted as it is to prevent the contemnor from interfering with the functions of the legislature, is more in the nature of what is known as civil contempt. Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body. State ex rel. Groppi v. Leslie, 44 Wis. 2d 282 at 296, 171 N. W. 2d 192 (1969). (Emphasis supplied) (App. p. 121-22a).*

The wording of the Assembly Resolution being such that it deals only with past conduct, the exercise of contempt power in the instant case flies in the face of what the Wisconsin Supreme Court defined as the function of legislative contempt power. According to the Wisconsin Court, legislative contempt power is a deterrent and is not intended as a means of punishment. Both the District Court (App. p. 91a) and the three judge panel of the Seventh Circuit (App. p. 80a) rejected this characterization and saw the contempt sentence as a criminal contempt—a punishment. According to these federal courts the proper characterization of the power is that expressed in *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1910).

... for criminal contempt the sentence is punitive, to vindicate the authority of the court. ... 221 U. S. 418, 441.

But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punish-

ment, but is intended to be remedial by coercing the defendant to do what he had refused to do. 221 U. S. 418, 442.

See also: Wright, *Federal Practice and Procedure*, Rule 42, Section 704, pp. 146-154. Father Groppi had not been ordered to do anything; he had not refused to do anything; he could not free himself by any action on his own part; he did not have the key to his own cell. The action on the part of the Assembly clearly, then, cited Father Groppi for criminal contempt, a citation the Wisconsin Court claimed the Assembly was powerless to pass. The Wisconsin Court's claim that the imprisonment was intended as a deterrent is without any rational support.

The idea of summary contempt arose, and is generally supported as a creature of necessity. According to a large body of authority, courts must on occasion, when provoked by unseemly conduct, retaliate in order to vindicate the dignity of the tribunal. The majestic functioning of the courts must not be slowed or stopped by obstructive or disruptive behavior. Hence, it is argued the courts must, of necessity, possess a contempt power. The State contends that such a power is even more essential to a legislative body, despite the fact that contempt powers are associated with government in the whole of the Western world only in common law countries. See Goldfarb, *The Contempt Power*, p. 2, Columbia University Press (1963).

Stark necessity is an impressive and often compelling thing, but unfortunately it has all too often been claimed loosely and without warrant in the law, as elsewhere, to justify that which in truth is unjustifiable. *United States v. Green*, 356 U. S. 165, 213, 78 S. Ct. 632, 2 L. Ed. 2d 672, 705 (1958).

Father Groppi was not engaged in any allegedly disruptive acts at the time the Resolution was passed. He had voluntarily left the Assembly Chambers two days earlier. He posed no immediate or future threat to the Assembly's functioning. See Wright, *Federal Practice and Procedure*, Rule 42, Section 707, pp. 164-168. Police, sheriffs, and National Guardsmen were all available and actively guarding the Capitol building subsequent to Father Groppi's departure from the Chambers. The Assembly by its Resolution, as shown above, intended only to punish a past act. *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375, 79 L. Ed. 802 (1934), stands for the proposition that once a contemptuous act occurs within the immediate view of a legislative body, jurisdiction attaches and the subsequent removal of the obstruction does not necessarily destroy that jurisdiction.

... Where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance. 294 U. S. 125, 148.

However, in *Jurney*, citing *Marshall v. Gordon*, 243 U. S. 521, 37 S. Ct. 448, 61 L. Ed. 881 (1916), it was said that the character of the offense was the only jurisdictional test to be applied by a reviewing court while

... the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment. 294 U. S. 125, 149.

The Court in *Marshall* (supra) described the appropriate test and limits more fully.

... when an act is of such a character as to subject it to be dealt with as a contempt . . . , we are of the opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right, *in the use of legitimate and fair discretion*, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference. 243 U. S. 521, 545.

Marshall was a case involving a contempt proceeding wherein the defendant was to be tried by the Senate, that is, summary contempt was not even an issue. In the present case, the Wisconsin Assembly sought to punish Father Groppi on the basis of an *ex parte* summary proceeding. The Assembly's action cannot be termed "the use of legitimate and fair discretion" in the *Marshall* or *Jurney* sense even as to regular contempt proceedings, much less summary ones. As stated above, the contempt power is one subject easily to abuse and one to be limited to the least exercise possible to achieve the necessary ends. *Anderson v. Dunn*, (supra). A court, today, could not, two days after a contemptuous act, summarily sentence a defendant *ex parte*. *Johnson v. Mississippi*, — U. S. —, 92 S. Ct. —, 29 L. Ed. 2d 423 (1971). Therefore, the legitimate use of discretion dictates that the Assembly in seeking to punish Father Groppi should have

relied upon the traditional criminal procedures of our society. The dignity of the Assembly relied upon proven practices rather than reverting to Star Chamber practices in ordering punishment *ex parte*. As Mr. Justice Holmes said for himself and Mr. Justice Brandeis:

When there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with the other illegal acts. *Toledo Newspaper Co. v. United States*, (dissent), 247 U. S. 402, 425-426, 38 S. Ct. 560, 62 L. Ed. 1186, 1196 (1918).

Reason and fairness demand even in punishing contempt, procedural safeguards within which the needs for the effective administration of justice can be amply satisfied while at the same time the reach of so drastic a power is kept within limits that will minimize abuse. *Sacher v. United States*, (dissent), 343 U. S. 1, 24, 72 S. Ct. 451, 96 L. Ed. 717, 731-732 (1951).

There was no need for expediency in the instant case. There was no need to exercise any contempt power, much less summary powers *ex parte*. There was no reason to deny Father Groppi all the traditional procedural incidents of the criminal justice system of Wisconsin. See *Harris v. United States*, 382 U. S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965).

Respect and obedience in this country are not engendered and rightly not—by arbitrary and autocratic procedures. In the end such methods only yield real contempt for all the courts and law. *United States v. Green*, (dissent), 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672, 707 (1958).

III. NOTICE AND AN OPPORTUNITY TO BE HEARD ARE REQUIRED IN THE EXERCISE OF SUMMARY CONTEMPT POWER.

Except for *Ex Parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888) and *Sacher v. United States*, 343 U. S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952), the many contempt cases, legislative and judicial, reported in our jurisprudence include none where the contemnor was given neither notice nor any opportunity to be heard prior to the finding of contempt and the pronouncement of sentence. In *Terry* however, the Court expressly withheld ruling on whether a Court could cite a person for contempt and order his imprisonment without any notice or hearing at a date subsequent to the alleged act of contempt. In *Sacher* the trial court made its finding of contempt and pronounced sentence without affording the contemnors any opportunity to be heard but did allow the contemnors the opportunity to be heard after sentence had been pronounced. Subsequent decisions upholding summary contempt convictions have stressed the fact that the trial court in each instance allowed the defendants to be heard prior to imposition of sentence. *Brown v. United States*, 359 U. S. 41, 79 S. Ct. 539, 3 L. Ed. 2d 609 (1959); *Levine v. United States*, 369 U. S. 610, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960).

In *Panico v. United States*, 375 U. S. 29, 84 S. Ct. 19, 11 L. Ed. 2d 1 (1963), this Court overturned a finding of contempt in a summary proceeding under Rule 42(a), Federal Rules of Criminal Procedure, holding that the record therein required a hearing to determine Panico's mental responsibility for his conduct. Similarly, in *Widger v. United States*, 244 F. 2d 103 (C. A. 5, 1957), the Fifth Circuit

Court of Appeals ruled the trial court there should have held a hearing on a contemnor's motion to vacate a judgment and sentence pursuant to the summary contempt provisions of Rule 42(a), Federal Rules of Criminal Procedure, when the motion to vacate challenged the factual basis for the contempt finding. The Court of Appeals emphasized the lack of notice of the contempt charge to the contemnor and his non-representation by counsel.

In a case involving summary contempt under Rule 42(a), Federal Rules of Criminal Procedure, Judge Friendly, dissenting in part, stated that "summary" means "only that certain usual procedural requirements may be dispensed with, not the basic rights can be sacrificed". *United States v. Galante*, 278 F. 2d 72, 78 (C. A. 2, 1962). The majority in *Galante*, while not approving the lack of an opportunity to respond, found no reversible error since there had been no request to be heard and no indication the trial court would have denied the contemnor a right to be heard. 278 F. 2d at p. 76. Judge Friendly's dissent in *Galante* has been commented upon favorably in 8 Moore's *Federal Practice-Cipes*, Criminal Rules, Section 42.04(2), p. 42-21, (Matthew Bender, 1970), and Wright, *Federal Practice and Procedure: Criminal*, Section 708, pp. 169-171, West Publishing Company, 1969). In addition, the right of allocution has long been recognized in cases of judicial summary contempt. *In re Maury*, 205 Fed. 626 (C. A. 9, 1913).

Our system of government is premised on the belief that the citizen must be protected against the exercise of absolute power by the Government. *United States v. U. S. District Court*, 9 Cr L. 2045 (C. A. 6, 1971). It is contrary to the American system to allow a person to be imprisoned without giving him an opportunity to respond to the charges against

him. *Hill v. United States*, 318 U. S. 424, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1968); *Green v. United States*, 365 U. S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1965); *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948); *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1933); *Galpin v. Page*, 85 U. S. (18 Wall) 350, — S. Ct. —, 21 L. Ed. 959 (1874).

Before any governmental body may act to deprive a citizen of his liberty, he is entitled to a minimal opportunity to be heard. This principal has been stated in many areas involving the interrelationship between the Government and the citizen. *Goldberg v. Kelly*, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (termination of welfare benefits); *Sherbert v. Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 1965 (1963) (disqualifying from unemployment compensation); *Slochower v. Board of Higher Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956) (discharge from public employment); *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (C. A. 5 1961) (suspension from public school); *Hahn v. Burke*, 430 F. 2d 100 (C. A. 7 1970) (probation revocation); *McCarley v. Sanders*, 309 F. Supp. 8 (M. D. Ala. 1970) (expulsion of a member from the legislature).

The procedures followed by the Wisconsin Assembly in citing Father Groppi for contempt and imposing sentence violated the ancient maxim that "no man shall be punished before he has had an opportunity of being heard", *The King v. Benn and Church*, 6 T. R. 198 (1795) (Lord Kenyon, Chief Judge). Without any prior notice to petitioner and without giving him or his counsel any opportunity to be present or to be heard the Assembly cited him for contempt, found him

guilty of an offense which had allegedly been committed two days earlier and sentenced him to imprisonment. Prior to the passage of the contempt resolution by the Wisconsin Assembly the Wisconsin Attorney General had obtained a temporary injunction from the Circuit Court for Dane County, Wisconsin, enjoining Father Groppi from any further disruptions of the Wisconsin Assembly. On October 17, 1969, the Circuit Court vacated the temporary injunction holding that the State had made no showing of any likelihood that the petitioner herein would commit any act to interfere with the processes of the Government of the State of Wisconsin. (App. pp. 61a-64a)

While it has long been held that legislative bodies have contempt powers, *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375, 79 L. Ed. 802 (1935), there is no other reported instance in which a legislative body exercised its contempt power without according the person charged the minimal requirements of due process, that is notice of the charge against him and an opportunity to answer the charge. In the exercise of its contempt power Congress has always met the minimal due process standards of notice and an opportunity to defend. Goldfarb, *The Contempt Power*, 163 (1963). Consistent with this tradition, the District Court herein envisioned a hearing before the Assembly in which the petitioner would have been required to show cause why he should not be punished for his conduct. 311 F. Supp. at 780. (App. p. 91a.) No protracted trial bringing the legislative process in Wisconsin to a halt was contemplated by the District Court or requested by petitioner herein.

In justification of its position that petitioner was not entitled to the minimal right to appear before the legis-

lative body in response to the charge, the Court of Appeals stated that petitioner's rights would be protected by the judicial review of the contempt resolution. 436 F. 2d at 331. (App. p. 86a.) In its opinion denying habeas corpus relief, the Wisconsin Supreme Court had indicated that such judicial review was available to the petitioner., *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N. W. 2d 192 (1969) (App. p. 109a).

Since earlier Wisconsin case law had indicated to petitioner that he was not entitled to any hearing on the merits of a contempt citation, *State ex rel. Reynolds v. County Court*, 11 Wis. 2d 560, 105 N. W. 2d 876 (1960), the petitioner moved the Wisconsin Supreme Court for a rehearing of its decision denying habeas corpus relief in order to clarify the right to judicial review. The petition for rehearing was denied by the Wisconsin Supreme Court without opinion. (App. p. 65a).

Assuming full judicial review of the factual basis of the legislative contempt resolution was available to petitioner, such post-conviction protection cannot be equated with the minimal protection that the petitioner requested prior to his imprisonment, especially where the State courts are denying petitioner bail pending such review. Mr. Justice Murphy so noted in his concurring opinion in *Estep v. United States*, 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946):

There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation.

Similarly, Justice Frankfurter dissenting in *In Re Oliver* stated:

But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair if in the Court in which the accused can contest for the first time the validity of the charge against him he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting. 333 U. S. at p. 284-85.

IV. THE CONCLUSIONARY NATURE OF THE LEGISLATIVE CONTEMPT RESOLUTION MAKES IT CONSTITUTIONALLY DEFECTIVE.

Not only was petitioner denied notice of the charge against him and an opportunity to respond thereto, but the Assembly's contempt resolution merely cited a legal conclusion without any statement of the underlying facts supporting that conclusion. Such a statement of the underlying facts is constitutionally required in order to sustain a finding and sentence of summary contempt. *Ex Parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888); *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1924).

This constitutional requirement has been codified in Rule 42(a) of the Federal Rules of Criminal Procedure and in cases decided thereunder. *Tauber v. Gordon*, 350 F. 2d 843 (C. A. 3 1965); *Widger v. United States*, 244 F. 2d 103 (C. A. 5 1957); *Parmelee Transportation Co. v. Keeshin*, 292 F. 2d 806 (C. A. 7 1961).

The failure to state the underlying facts supporting the contempt resolution compounds the difficulties already

cited herein for petitioner to obtain a meaningful judicial review of the contempt order, i.e. the question as to the availability of any judicial review and the lack of any transcript of the proceedings in the legislature. See *Great Lakes Screw Corp. v. N. L. R. B.*, 409 F. 2d 375 (C. A. 7, 1969).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded to the District Court for the entry of an order granting the Petition for Habeas Corpus and releasing petitioner from any further custody or restraint pursuant to the Resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969.

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